STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-20-126

DELBERT A. REED,

Appellant,

v.

SECRETARY OF STATE
MATTHEW DUNLAP, et al.,

Appellees

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Dated: **April 23, 2020**

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INTRODUCTION

Intervenor NextEra Energy Resources, LLC ("NextEra") on behalf of certain affiliates,[1] submits its Brief in support of the Appellee Secretary of State's ("Secretary") determinations that the citizen initiative petition entitled "Resolve, To Reject the New England Energy Connection Transmission Project" ("Referendum") satisfies the constitutional requirements to proceed to ballot in November of this year. The Secretary's determinations were lawful, within his discretion, and applied the law consistent with the plain and clear language of the applicable statutes. Therefore, his determination that the Referendum is valid should be affirmed.

STATEMENT OF THE FACTS

On February 3, 2020, supporters of the Referendum submitted to the Secretary 15,785 petitions containing 82,449 signatures. Over the next 30 days, the Secretary reviewed the petitions and issued a determination on March 4, 2020 ("Original Determination"), finding that 69,714 signatures were valid, which were 6,647

[1] NextEra is an indirect owner of the following Maine-based solar and wind projects under development: Chariot Solar, LLC; Dawn Land Solar, LLC; Kennebec Solar, LLC; Lone Pine Solar, LLC; Moose Wind, LLC; and Penobscot Wind, LLC (collectively "NextEra's Maine Renewable Projects"). On March 23, 2020, the Superior Court granted NextEra's Motion to Intervene on behalf of the NextEra Maine Renewable Projects. In the Superior Court proceeding, NextEra submitted a brief in support of the Secretary's April 1, 2020 Amended Determination.

signatures more than is required to qualify for the ballot.[2] On March 13, 2020, Delbert A. Reed, Appellant, filed a Petition with the Cumberland County Superior Court ("Superior Court") seeking a review of the Original Determination alleging that certain petition signatures the Secretary found valid were invalid under Maine law. On March 20, 2020, Appellant also filed a motion seeking to engage in discovery and take additional evidence before the Superior Court. On March 23, 2020, the Superior Court denied Appellant's motion while remanding the case to the Secretary to take additional evidence pursuant to 5 M.R.S. § 11006(1)(B), deferring to the Secretary's plenary power to determine which of Appellant's allegations to investigate, and the process to investigate the allegations.

On April 1, 2020, after additional investigations and review of additional information submitted by Appellant and evidence collected by the Secretary, the Secretary submitted an Amended Determination, which confirmed that 66,117 signatures were valid, exceeding the 10% threshold by 3,050 signatures. Therefore, the Secretary reaffirmed that the Referendum should proceed to ballot in November.

On April 4, 2020, Appellant Reed, Intervenors Industrial Energy Consumer Group ("IECG") and the Maine State Chamber of Commerce ("Chamber") submitted briefs (referred to herein as Reed Sup. Ct. Br.; IECG Sup. Ct. Br., and

[2] The Maine Constitution requires that a petition for a citizen initiative obtain valid signatures totaling not less than 10% of the total votes cast for Governor in the last gubernatorial election preceding the filing of the petition ("10% threshold")). Me. Const. art. IV, pt. 3 § 18(2).

Chamber Sup. Ct. Br.) requesting that the Superior Court reverse the Secretary's Amended Determination and invalidate the petition for Referendum, asserting that the Secretary (1) abused his discretion and acted in an arbitrary and capricious manner by not conducting a wide-spread fraud investigation and conducting an evidentiary hearing; (2) lacked evidence to support his findings; and (3) misinterpreted 21-A M.R.S. § 903-E. After a review of the Amended Determination, the briefs of the Secretary and other parties, and the record, the Superior Court found the record supported the Secretary's determination, including that the plain language of the relevant statutes did not compel a result contrary to the Secretary's interpretation, and, accordingly, affirmed the Secretary's April 1, 2020 Amended Determination. *See, Reed v. Dunlap*, BCD-AP-20-02 (Me. Sup. Ct. April 13, 2020). On April 15, 2020 Appellant Reed filed a notice of appeal of the Superior Court's decision, followed on April 16, 2020 by notices of appeal by IECG and Chamber (herein collectively referred to as "Appellants").

STATEMENT OF THE ISSUES

1. Whether the Secretary acted reasonably and within his discretion when he decided not to conduct an additional full-scale investigation of fraud?
2. Whether the Secretary acted reasonably and within his discretion when he declined to conduct an evidentiary hearing?
3. Whether the Secretary's finding not to conduct an additional full-scale investigation into fraud was supported by competent evidence?
4. Whether the Secretary's interpretation of 21-A M.R.S. § 903-E, a statute administered by the Secretary, was consistent with legislative intent, and, therefore, deserving of deference?

SUMMARY OF THE ARGUMENT

In 1909, the people of Maine reclaimed their constitutional right to legislate through a citizen initiative referendum, such as the instant Referendum. *McGee, v. Sec'y of State*, 2006 ME 50, ¶¶ 21-39, 896 A.2d 933*; Allen v. Quinn*, 459 A.2d 1098, 1102-1103 (Me. 1983). It is well-settled that the citizen initiative process is core political speech that is protected by the First and Fourteenth Amendments to the Federal Constitution, *Wyman v. Sec'y of State*, 625 A.2d 307, 311 (1993), quoting *Meyer v. Grant*, 486 U.S. at 414, 421-422 (1988) ("'The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. . . . Thus the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"). It is equally well-settled that the Secretary has the plenary power to investigate and decide the validity of the petitions associated with a citizen initiative. *See, Me. Taxpayers Action Network v. Sec'y of State*, 2002 ME 64, ¶ 12 n.8, 795 A.2d 75; 21-A M.R.S. § 905.

Within this context, the Secretary reviewed the evidence, made findings, applied the law, and issued two determinations, both of which validated the Referendum. The record shows the Secretary diligently gathered and reviewed evidence, reasonably exercised his discretion and plenary authority to make findings supported by the evidence, and interpreted 21-A M.R.S. § 903-E consistent with the

Legislature's intent. The Superior Court's well-reasoned decision correctly affirmed the Secretary's decision as consistent with the law, a reasonable exercise of discretion, and supported by competent evidence. *Reed*, BCD-AP-2-02. Thus, contrary to the assertions of the Appellants, the Secretary issued two lawful decisions validating the Referendum. Accordingly, the Secretary's Amended Determination is entitled to deference and should be affirmed.

STANDARD OF REVIEW

Review of an agency's decision-making is "deferential and limited." *Watts v. Bd. of Envtl. Prot.*, 2014 ME 91, ¶ 5, 97 A.3d 115, quoting *Friends of Lincoln Lakes v. Bd. of Envtl. Prot.*, 2010 ME 18, ¶ 12, 989 A.2d 1128. Appeals under M. R. Civ. P. 80C, such as the instant case in which the Superior Court acted in its intermediate appellate capacity, the Law Court reviews the agency's decision directly for errors of law, abuse of discretion, or findings not supported by substantial evidence. *Doe v. Dep't of Health and Human Services*, 2018 ME, 164, ¶ 11, 198 A.3d 782; *Palesky v. Sec'y of State*, 1998 ME 103, ¶ 9, 711 A.2d 129. The Court will not vacate a decision of the Secretary unless it "violates the Constitution or statutes; exceeds the agency's authority; is procedurally unlawful; is arbitrary or capricious; constitutes an abuse of discretion; is affected by bias or an error of law; or is unsupported by the evidence in the record." *Kroeger v. Dep't of Envtl. Prot.*, 2005 ME 50, ¶ 7, 870 A.2d 566.

When reviewing an agency's factual findings, the Law Court examines the entire record, and will affirm the findings if they are supported by substantial evidence. *Passadumkeag Mt. Friends v. Bd. of Envtl. Prot.*, 2014 ME 116, ¶¶ 7-8, 102 A.3d 1181. The Court will not vacate an agency's finding unless the record contains no competent evidence to support the finding. *Id*.

Although the Law Court reviews questions of law *de novo* (*Doe,* 2018 ME, 164, ¶ 11, 198 A.3d 782), the Court defers to the agency's interpretation of a statute that it administers, unless the interpretation plainly compels a contrary result. Further, statutes regulating the constitutionally recognized right of the people to conduct a citizen initiative are interpreted in favor of the exercise of that right and consistent with the constitution. *Allen*, 459 A.2d at 1102-03. If the meaning of a statute regulating a citizen initiative is in doubt, that doubt is resolved in favor of the people's exercise of its right to proceed with the citizen initiative. *McGee*, 2006 ME 50, ¶ 18, 896 A.2d 933. Also, a citizen initiative referendum implicates core political speech, and any regulation thereof is subject to exacting scrutiny and must be narrowly tailored to serve a compelling state interest. *Wyman,* 625 A.2d at 311, citing *Meyer*, 486 U.S. at 420, 425.

ARGUMENT

I. The Secretary's investigation into alleged fraud was reasonable and within his sound discretion.

In the underlying proceeding, Appellants asserted that the Secretary abused his discretion and acted arbitrarily and capriciously by not conducting a large scale fraud investigation and not conducting an evidentiary hearing in which Appellant Reed could cross-examine witnesses. Reed Sup. Ct. Br. at 16-22; IECG Sup. Ct. Br. at 6-9. The law required neither.

Appellant Reed presented evidence that led the Secretary to conclude that one circulator – Megan St. Peter – had engaged in fraud in gathering signatures. While the Secretary might have examined each and every one of the 174 signatures submitted by Ms. St. Peter, consistent with his plenary power, the Secretary invalidated all 174 signatures associated with this circulator. *Reed*, BCD-AP-2-02 at 18; Amended Determination at ¶ 8.

The Secretary also considered whether there was sufficient evidence to conduct an additional full-scale investigation of alleged fraud, and decided there was not. *Id*. at ¶ 10. The Secretary's decision to not conduct a full-scale investigation came after 30 days of extensive examination and investigation of the 15,785 petition forms upon which the Secretary reached his Original Determination, and, thereafter, at the direction of the Superior Court, the Secretary conducted an additional examination and investigation, which included conducting interviews with the

notaries Appellant Reed claimed needed to be investigated, a review of hundreds of pages of additional documentation provided by Appellant, and the review of additional evidence collected by the Secretary. Given that in the totality of these examinations and investigations (1) only one circulator of the approximately 560 circulators who gathered signatures was found to have engaged in fraud; (2) there was no evidence to support that any of the nine notaries identified by Appellant Reed committed fraud; and (3) there were no reports of fraud by municipal officials who pursuant to 21-A M.R.S. § 902-A must report petitions suspected of fraud or other violations, the Secretary reasonably concluded that conducting an additional full-scale investigation into alleged fraud was not warranted. Hence, the Secretary's actions were informed by the entire record, well within his discretion, reasonable, and logical given the facts, circumstances, and applicable law. *Anglez Behavioral Health Serv. v. HHS*, 2020 ME 26, ¶ 23 (the "'arbitrary or capricious' standard is high, and we will "not find that an administrative agency has acted arbitrarily or capriciously unless its action is 'wilful and unreasoning' and 'without consideration of facts or circumstances.'", quoting *Kroeger*, 2005 ME 50, ¶ 7, 870 A.2d 566); *Forest Ecology Network v. Land Use Reg. Comm'n*, 2012 ME 36, ¶ 28, 39 A.3d 74 (appellant has the burden of persuasion that abuse of discretion occurred by showing the agency's action "exceeded the bounds of reasonable choices"); *Sager v. Town of Bowdoinham*, 2004 ME 40 ¶ 11, 845 A.2d 567 (there is no abuse of discretion when

an agency makes reasonable choices in light of the facts and circumstances of the proceeding and the law).

Similarly, the Secretary's denial of Appellant Reed's request for an evidentiary hearing was reasonable given the facts and circumstances of the proceeding and the law. Appellant Reed had no right by law or regulation to an evidentiary hearing during the expedited citizen initiative referendum review process established in the Maine Constitution (Me. Const. art. IV, pt. 3 § 22) and in 21-A M.R.S. § 905. *See, Palesky*, 1998 ME 103, ¶¶ 4-5, 711 A.2d 129 (21-A M.R.S. § 905 does not entitle one to an evidentiary hearing). Given Appellant Reed had no right to an evidentiary hearing, it follows that the Secretary's declining to hold such a hearing was well within his discretion. *Passadumkeag*, 2014 ME 116, ¶ 7, 102 A.3d 1181 (an agency's interpretation of its statute is entitled to deference unless the statute plainly compels a contrary result). Accordingly, the manner in which the Secretary chose to investigate fraud and his decision not to hold an evidentiary hearing were reasonable and well within his discretion under 21-A M.R.S. § 905, and, therefore, the Amended Determination validating the Referendum should be affirmed.

II. The Secretary's findings are supported by competent evidence, and, therefore, deserving of deference, and should be affirmed.

In a recasting of an abuse of discretion claim, Appellant IECG in the underlying proceeding reiterated the Secretary erred by not investigating fraud, because "[t]he record does not contain substantial evidence to support the Secretary's decision against investigating fraud . . . ." IECG Sup. Ct. Br. at 9. Appellant's assertion is without merit.

First, as explained, *supra* in Section I, the Secretary did investigate alleged fraud. The Secretary followed the guidance from the Superior Court, and, exercising his plenary authority, conducted an investigation into the allegations from Appellant Reed. That the Secretary did not allow the Appellants themselves to conduct the investigation does not undermine its legitimacy.

Second, the well-settled standard of review is whether the Secretary's findings are supported by substantial evidence, and whether the evidence relied on by the Secretary was of the type a reasonable mind would rely on to make the Secretary's conclusions. *Richard*, 2018 ME 112, ¶ 21, 192 A.3d 611. Contrary to the Appellants' claims, the Secretary developed a thorough evidentiary record that supports his decision. The evidence collected, examined, investigated, and relied on by the Secretary to make findings, including Finding No. 10 that there was no need

for an additional full-scale investigation into alleged fraud,[3] included consideration of, among other competent evidence: (1) interviews with notaries; (2) a comparison of signatures to registered voters and residents of Maine; (3) a comparison and elimination of duplicate signatures; (4) whether the circulator's affidavit was timely filed with the Secretary; (5) the execution of an oath in relationship to the timing of signing the petition; (6) the proper administration of the oath; (7) whether deadlines to submit petitions to the municipal registrar were met; (8) examination of signatures for whether they had been crossed out, whether there was a lack of a signature, or whether the signature was made by another; and (9) material alterations to the petition. *See*, Original and Amendment Determinations. Hence, not only was there no lack of diligence on the part of the Secretary to investigate and invalid signatures, his findings are supported by evidence that a reasonable mind would rely on to support his conclusions, including the finding that, based on the record, there was no need to conduct a full-scale investigation into alleged fraud. Amended Determination at ¶ 10. Thus, the Secretary's decision not to conduct a greater, full-

[3] Finding No. 10 reads:

> Although counsel for Mr. Reed and others have argued that the evidence of forgery on petition #743 warrants a full-scale investigation of potential fraud in this petition drive, they have not pointed to any other indications of fraud after several weeks of carefully scrutinizing the petitions. Moreover, our office did not receive any reports from municipal officials, who are required by law (21-A M.R.S. § 902-A) to provide us with copies of any petitions that they suspect are in violation of any statutory or constitutional requirements.

scale, investigation into fraud was supported by competent evidence, and is therefore entitled to deference, and should be affirmed. *Richard*, 2018 ME 122 ¶ 21-23, 192 A.3d 611; *Watts,* 2014 ME 91, ¶¶ 5, 11-14, 97 A.3d 115; *Passadumkeag*, 2014 ME 116, ¶ 8, 102 A.3d 1181 ("We will vacate an agency's factual findings only if the record contains no competent evidence to support them.")

III. The Secretary's interpretation and application of 21-A M.R.S. § 903-E is consistent with the legislative intent, and, thus, is deserving of deference.

The statute at issue, 21-A M.R.S. § 903-E, was enacted to regulate the authority of a notary to administer oaths to circulators. This statute reads:

> **1. Certain notaries public and others**. A notary public or other person authorized by law to administer oaths or affirmations generally is not authorized to administer an oath or affirmation to the circulator of a petition under section 902 if the notary public or other generally authorized person is:
>
> A. Providing any other services, regardless of compensation, to initiate the direct initiative or people's veto referendum for which the petition is being circulated. For the purposes of this paragraph, "initiate" has the same meaning as section 1052, subsection 4-B; or
>
> B. Providing services other than notarial acts, regardless of compensation, to promote the direct initiative or people's veto referendum for which the petition is being circulated.

21-A M.R.S. § 903-E (emphasis added.)

The emphasized language ("is providing") supports the Secretary's interpretation of the plain language of the statute as establishing a temporal, present

and future tense, and forward-looking test – *i.e.,* "is providing" non-notarial services. *Reed*, BCD-AP-2-02 at 12-14. Consistent with this plain and unambiguous language, the Secretary interpreted 21-A M.R.S. § 903-E as disqualifying notaries and their associated petitions/signatures who first provided any non-notarial services and then administered notary oaths (*i.e.,* notaries McGovern and Underhill). Amended Determination at ¶¶ 6(E)(F). Because it was present- and forward-looking, the Secretary's interpretation upheld the petitions/signatures notarized by one who first administered notary oaths and then subsequently provided non-notarial services (*i.e.,* notaries Flumerfelt and Skidmore). *Id*. at ¶¶ 6(H)(I).

The Superior Court found the Secretary's interpretation of the temporal sequencing of the authority to administer an oath prior to providing services to be consistent with the plain and clear language of 21-A M.R.S. § 903-E, and supported by appropriately focusing on the point in time in which the oath was administered. *Reed*, BCD-AP-2-02 at 10-11, citing *United States v. Curtis*, 107 U.S. 671, 673 (1882). The Superior Court's conclusion is consistent with the well-settled law that when an agency is charged with administering a statute, such as 21-A M.R.S. § 903-E, the agency's interpretation is deserving of deference, and must be upheld unless the statute plainly compels a contrary result. *SAD 3 Educ. Assn' v. RUS 3 Bd. of Dirs.*, 2018 ME 29, 180 A3d 125 ("When a dispute involves a board or agency's interpretation of a statute it administers, 'the agency's interpretation, although not

conclusive, is entitled to great deference and will be upheld unless the statute plainly compels a contrary result.'") quoting *Town of Eagle Lake*, 2003 ME 37, ¶ 8, 818 A.2d 1034; *Passadumkeag*, 2014 ME 116, ¶ 7, 102 A.3d 1181. Given that present tense language expressly used by the Legislature in 21-A M.R.S. § 903-E and the Secretary's following the plain and clear language, there is no compelling contrary result that was intended by the legislature. *Knutson*, 2008 ME 124, ¶ 9, 945 A.2d 1054 ("In construing Maine statutes, our primary purpose is to give effect to the intent of the Legislature. . . . We first effectuate the plain language of the statute. If the language of the statute is ambiguous, we defer to the Secretary's interpretation if that interpretation is reasonable.") (citation omitted). Therefore, the Superior Court correctly affirmed that the Secretary following the plain reading of the statute properly found the signatures associated with circulator petitions notarized by Flumerfelt and Skidmore were valid, as they provided services to the Referendum after their notary services ended. Accordingly, given that the Secretary is charged with administering the language of 21-A M.R.S. § 903-E and followed a plain language reading of this statute, his interpretation is deserving of deference and should be upheld.

As to notary Huckey, the Secretary determined that Huckey carrying a certified petition from the Augusta City Clerk's office to the campaign office of the Referendum was a *de minimis* service that did not disqualify his administering of

oaths. Amended Determination at ¶ 6(G). The Secretary determined that the single action of carrying already certified petitions from point A to point B, with point B being the campaign headquarters of the Referendum, did not disqualify Huckey's notarial acts. *Id*. That determination is entitled to deference. *See, e.g.*, *Knutson*, 2008 ME 124, ¶ 9, 945 A.2d 1054. This is particularly so given 21-A M.R.S. § 905(1), which provides that "[t]he Secretary of State may invalidate a petition if the Secretary of State is unable to verify the notarization of that petition.") (Emphasis added.) The Legislature's use of the word "may" in 21-A M.R.S. § 905(1), rather than "shall" or "must" is significant, and, further reflects the Secretary's considerable discretion given his plenary authority to determine the validity of petitions. *Fitzpatrick v. McCrary*, 2018 ME 48, ¶ 16, 182 A.3d 737 ("'In general, the word 'may,' used in statutes, will be given ordinary meaning, unless it would manifestly defeat the object of the statute, and when used in a statute is permissive, discretionary, and not mandatory.'") quoting *Collins v. State*, 161 ME 445, 449, 213 A. 2d 835 (Me. 1965). In the instant case, it is axiomatic that maintaining the ordinary meaning of the word "may" fosters the statutory objective of providing the Secretary the discretion to interpret and administer the statutory scheme in a manner that favors the people's right to conduct citizen initiatives. *McGee*, 2006 ME 50, ¶ 18, 896 A.2d 933; *Allen*, 459 A.2d 1098, 1102-03.

The Superior Court agreed with the Secretary's result, but questioned whether Huckey's actions even fall within any reasonable definition of service, particularly in the absence of a statutory definition for what constitutes a non-notarial service. *Reed*, BCD-AP-2-02 at 16-17. Unlike the temporal nature and wording of the statute being plain and clear, the term "services" in 21-A M.R.S. § 903-E is ambiguous: "**any other services** . . . to initiate a direct initiative or people's vote referendum for which the petition is being circulated" and "**services other than notarial acts** . . . to promote a direct initiative or people's vote referendum for which the petition is being circulated." (emphasis added). Given that the statute provides no definition of what constitutes these "services", the term is subject to multiple interpretations and, hence, ambiguous. When a statute is ambiguous, courts defer to the Secretary's interpretation of statutes it administers. *Knutson*, 2008 ME 124, ¶ 9, 945 A.2d 1054, citing *Arsenault v. Sec'y of State*, 2006 ME 111, ¶ 11, 905 A.2d 285, 287-88. Thus, the Secretary's decision that Huckey's notarizations were valid given his plenary authority and the ambiguous nature of the term services as used in 21-A M.R.S. § 903-E is entitled to deference and should be upheld.

IV. Appellants' interpretation of 21-A M.R.S. § 903-E is inconsistent with fundamental principles of statutory construction and with the First and Fourteenth Amendments to the Federal Constitution.

Appellants assert the Secretary erred by not interpreting 21-A M.R.S. § 903-E as a "bright-line" restriction on notaries providing any non-notarial services to initiate or promote a referendum at any time during the process.[4] Reed Sup. Ct. Br. at 9-16; Chamber Sup. Ct. Br. at 1-8. In addition to the arguments, *supra*, that demonstrate Appellants' assertions fail based on the application of the well-settled rules of statutory construction and agency deference, the assertions also fail as they are inconsistent with the First and Fourteenth Amendments to the Federal Constitution.

Appellants' interpretation of 21-A M.R.S. § 903-E as a bright-line restriction on notaries providing any non-notarial services and at any time to initiate or promote a referendum is analogous to similar speech-based restrictions that have been struck down as unconstitutional. *See, e.g., Meyer*, 486 U.S. at 425 (struck down Colorado statute that prohibits circulators from being paid); *Buckley v. Am. Const. Law*, 525 U.S. 182 (1999) (stuck down Colorado statute requiring circulator to be registered voter and wear an identification badge); *On Our Terms '97 PAC v. Sec'y of Maine*, 101 F. Supp. 2d 19 (U.S. Dist. ME 1999) (struck down Maine 21-A M.R.S. § 904-

[4] Appellants assert that the Secretary was required to invalidate all of the signatures associated with the following notaries: Leah Flumerfelt, Brittany Skidmore, and Wesley Huckey.

A's prohibition on payments to circulators for direct initiative referendum as violating the First Amendment). In fact, in the underlying proceeding, Appellant Reed suggested that the purpose of 21-A M.R.S. § 903-E was to "dramatically expand the scope of the prohibition" (Reed Sup. Ct. Br. at 15), which is inapposite to settled precedent which requires that restrictions on political speech, including the right to exercise a citizen initiative, must be narrowly tailored. *See*, *Wyman*, 625 A.2d at 311 ("Restrictions on the right to undertake an initiative are subject to exacting scrutiny, must be justified by a compelling state interest and be narrowly tailored to serve that interest"), citing *Meyer*, 486 U.S. at 420, 425. Accordingly, Appellants' interpretation of 21-A M.R.S. § 903-E which is far afield from a narrowing of the restrictions must fail as it is inconsistent with the First Amendment.

Furthermore, although not directly articulated in the Amended Determination, it is reasonable to read the Secretary's interpretation and application of 21-A M.R.S. § 903-E as his attempt to narrow the restrictions to make it consistent with the First Amendment. It is axiomatic that the providing of non-notarial services by a notary to initiate and promote the Referendum are ineluctably core political speech that is protected by the First Amendment, which provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably

to assemble, and to petition the Government for a redress of grievances."[5] *See, Wyman*, 625 A.2d at 311 ("The initiative petition process involves core political discourse that is protected by the first amendment of the federal constitution").

The Secretary's present and prospective looking and *de minimis* tests to disqualify notarized signatures are narrowly tailored applications of 21-A M.R.S. § 903-E that address the interest in the integrity of the citizen initiative referendum process, and, therefore, should be upheld. In contrast, Appellants' interpretation of the statute ignores fundamental principles of statutory construction, the substantive and constitutional rights at issue here, and the significant deference accorded to the Secretary in exercising his plenary authority to examine referendum petitions, and should be rejected.[6]

[5] The prohibition on the abridgment of free speech is made applicable to the State of Maine through the Fourteenth Amendment. *Id*. The Fourteenth Amendment reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[6] Arguably, even a narrowed tailored application of 21-A M.R.S. § 903-E may run afoul of the First Amendment. *Cf. Meyer*, 486 U.S. at 438; *also, see, Maslow v. Bd. of Elections*, 658 F.3d 291, 294 (2nd Cir. 2009) (New York statute explicitly permits notaries to be circulators); *In re Nomination of Boyle*, 91 A3d 260 (Pa. Commw. 2014) ("Circulation of pages of a candidate's nomination petition does not constitute a direct interest in the candidacy and does not disqualify a notary from notarizing affidavits of other circulators of the nomination petition").

CONCLUSION

For the foregoing reasons, NextEra respectfully requests that the Court affirm the Secretary's Amended Determination that the petition for the Referendum is valid and thereby allow the question on the November ballot for a vote by the citizens of Maine.

Dated at Portland, Maine this 23rd day of April, 2020.

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CERTIFICATE OF SERVICE

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